**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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Date: July 27, 2001

Case No.: **2001-INA-36**
CO No.: **P1998-NJ-02394237**

*In the Matter of:*

**UNIVERSITY COTTAGE CLUB**
*Employer*

*on behalf of*

**NORIS FLORES**
*Alien*

Certifying Officer: Dolores Dehaan
New York, New York

Appearance: Franklin S. Abrams, Esquire
New York, New York

Before: Vittone, Burke and Wood
Administrative Law Judges

JOHN M. VITTONE
Chief Administrative Law Judge

## DECISION AND ORDER

This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5) of the Immigration and Nationality Act, 8 U.S.C.§1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. This decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27 (c).

## Statement of the Case

The Employer, on September 23, 1996, filed an *Application for Alien Employment Certification* (ETA 750) to permit the employment of the Alien as "Supervisor." (AF 1-7). The duties were described as follows:

> Supervises and coordinates activities of workers engaged in serving food in university eating club which seats 160. Directs workers engaged in stocking and preserving cleanliness of serving stations, supervises serving of food, inspects serving operations to ensure that serving and busing meet prescribed standards. Assign duties to workers. Direct workers engaged in removing food after meals and cleaning tables and work areas. Assist workers in serving members. Supervise and participate in cleaning of kitchen.

(AF 7). The minimum requirement for the position was stated to be two years experience in the job offered or two years experience as a Waiter/Waitress. The salary offered was $8.00 per hour. The Alien was to supervise two employees and would be supervised by the Manager. *Id*.

A Principal Labor Market Analyst for the State agency responsible for the initial processing of the application determined on September 3, 1998, that the correct prevailing wage for the position was $20.32 per hour. This was based on the "OES" Survey for the year 1996 for OES Code 61099. (AF 8). The State agency proceeded to inform the Employer that the salary it offered was below the prevailing wage and that it would need to increase its wage offer to $20.32 per hour. The Employer was also requested to clarify whether it offered cafeteria or restaurant style dinning. (AF 9-12).

The Employer responded on November 7, 1998, that it was willing to increase its wage offer to $9.00 per hour but felt that the stated prevailing wage was too high given the nature of the duties. The Employer proceeded to describe the Alien's supervisory duties as follows:

> We serve buffet style. The people to be supervised are best described as Dining room Attendants. They carry dirty dishes, clean tables and chairs, replace soiled table linens, set tables, replenish dining room supplies, supply the service bar with salads and cold foods, clean and polish the service bar, steam table and equipment, make coffee, fill juice dispenser, and sweep and mop the floor. Since this is actually the work presently done by the Alien, her description on her biographical forms has also been amended. The related occupation has been amended on our item 14.
>
> Accordingly, the occupational title of the job offered comes closest to Counter Supervisor, the occupation whose duties were listed in item 13. In order to clarify, we have added the sentence "Service is buffet style, and worker supervises 2 dining room attendants doing busing of tables and stocking and cleaning of tables

and service bars.

(AF 15).

The case was reviewed on November 13, 1998 by the Principal Labor Market Analyst who determined again that the position fell under OES code 61099, for which the 1996 prevailing wage for Level 2 was $20.32 per hour. The State agency then transmitted the case to the CO with the notation that the Employer had offered a wage of $9.00 per hour whereas the local prevailing wage was $18.65 per hour. This was reportedly determined by the Market Analyst on August 9, 2000 based on the 1998 OES wage, Level 2, for "All other Supervisors & Managers, Service Workers." (AF 16-18).

On August 11, 2000, the CO issued a Notice of Findings ("NOF") proposing to deny the application on the basis that the Employer's wage offer was below the prevailing wage for the Trenton, New Jersey statistical area of $18.65 per hour for a Level 2 Counter Supervisor, Code 61099. (AF 20-21). The Employer was advised that it could rebut this finding by conducting its own wage survey in accordance with item J of the General Administrative Letter (GAL) No. 2-98 or amend its wage offer to $18.65 per hour. (AF 20).

Counsel for the Employer filed a rebuttal on August 18, 2000. (AF 22-23). In the rebuttal, he responded to the NOF by challenging the use of Level II instead of Level I in determining the prevailing wage. Counsel contended that the work performed was that of a "counter supervisor" supervising workers performing tasks of a simple nature and did not involve use of advanced skills, diversified knowledge, planning of work and the solving of unusual and complex problems which are indicative of a Level II position. *Id*.

On October 3, 2000, the CO issued a Final Determination denying the application for certification. (AF 24-25). The CO disagreed that the position as described in the ETA 750 was a Level I position in that it required a "fully competent worker who will use his own judgement in planning and conducting his/her work assignments and who will independently supervise and provide direction to workers who perform tasks equivalent to level 1." (AF 24). The Employer has requested a review of this denial, and the record has been submitted to the Board for such purpose.

## Discussion

Section 656.20 (c)(2) of the regulations provides that the ETA 750 must clearly show that the wage offered equals or exceeds the prevailing wage determined pursuant to § 656.40 In turn, § 656.40 provides that if the position is not covered by a prevailing wage determination under the Davis-Bacon and Service Contract Acts, the prevailing wage shall be determined by the average rate of wages, that is the rate of wages to be determined, to the extent feasible, by adding the wage paid workers similarly employed in the area of intended employment and dividing the total by the number of such workers. "Similarly employed" is defined in subsection (c) as "having

substantially comparable jobs in the occupational category in the area of intended employment." "Area of intended employment" is defined in §656.3 as the area within normal commuting distance of the place (address) of intended employment. If such address is within a Metropolitan Statistical Area (MSA) any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.

In determining a prevailing wage for the position involved here, the wage specialist and CO relied on their interpretations of the instructions contained in the GAL 2-98. We note that GAL 2-98 is neither a law nor regulation. It is an internal document intended to offer guidelines to state agencies which are initially responsible for determining the appropriate prevailing wage when processing alien employment certification applications. The memorandum, which accompanied publication of GAL 2-98, indicates that the directive was developed to increase the timeliness and accuracy of prevailing wage determinations and consequently, it was determined that this could be accomplished by using the wage component of the Bureau of Labor Statistics expanded Occupational Employment Statistics (OES) program.

The GAL instructs State agencies to determine which of the two levels in the OES survey is appropriate in accordance with the following pertinent guidelines:

1. Level I

Beginning level employees who have a basic understanding of the occupation through education or experience. They perform routine or moderately complex tasks that require limited exercise of judgement and provide experience and familiarization with the employer's methods, practices and programs. They may assist staff performing tasks requiring skills equivalent to a level II and may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Work is closely monitored and reviewed for accuracy.

2. Level II

Fully competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgement and independent evaluation, selection, modification and application of standard procedures and techniques. Such employees **use advanced skills and diversified knowledge to solve unusual and complex problems.** They may supervise or provide direction to staff performing tasks requiring skills equivalent to a level 1. These employees receive only technical guidance and their work is reviewed for the application of sound judgement and effectiveness in meeting the establishment's procedures and expectations.

...

(Emphasis added.)

These "guidelines" must be interpreted bearing in mind the regulatory requirement that the prevailing wage is to be the average of wages for workers' "having substantially comparable jobs in the occupational category." This is particularly true where, as here, the OES wage used embraces a wide category of supervisors and managers.[1] Obviously, when using statistics that are this broad, some degree of discretion must be exercised by wage specialist, and if not, by COs.

In the instant case, we do not see where the Alien, or any worker, in the position as described in the ETA 750 and the Employer's response of November 7, 1998, approaches the need for "advanced skills and diversified knowledge to solve unusual or complex problems." To the contrary, the work is routine with what would appear to be little variance on a day to day basis. There is nothing complex about telling the two workers to be supervised by the Alien that the floor needs sweeping or the salad greens need to be refilled.

Accordingly, we conclude that the Employer's job offer is clearly a level 1 position. As the job has not been advertised as yet, a Remand is necessary to permit recruitment at the level 1 prevailing wage.

## ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for further review as described above.

Entered at the direction of the panel:

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JOHN M. VITTONE
Chief Administrative Law Judge

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will

[1]The OES code employed here, 61099, covers Supervisors and Managers of "Service Workers" other than Police and Detectives and Housekeeping. The *Dictionary of Occupational Titles* (D.O.T.) lists numerous "Service Occupations," which embrace not only food service workers but a wide range of occupational fields, e.g., lodging, barbering, embalming, amusement and recreation and transportation. The D.O.T. lists supervisory positions within the Service Occupation category as diverse as Supervisor, Commissary Production, 319.137-022, to Supervisor, Airplane Flight Attendant, 352.137-010.

become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity in its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk**
**Office of Administrative Law Judges**
**Board of Alien Labor Certification Appeals**
**800 K Street, N.W., Suite 400**
**Washington, DC 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.